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APPELLATE CASE NO. CVA2016-005
(Superior Court of Guam Special Proceedings Case No. SP0137-14)

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OF GUAM

IN THE SUPREME COURT OF GUAM

**IN THE APPLICATION OF DEPARTMENT
OF HEALTH AND SOCIAL SERVICES
FOR ADMINISTRATIVE INSPECTION
AND SEARCH WARRANT OF WISE OWL
ANIMAL HOSPITAL**

**OPPOSITION BRIEF OF THE GOVERNMENT—APPELLEE
DEPARTMENT OF PUBLIC HEALTH AND SOCIAL SERVICES**

On Appeal from the Superior Court of Guam

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CERTIFICATE REQUIRED BY GUAM R. APP. P. 13(j)

The undersigned counsel of record for Government-Appellee Department of Public Health and Social Services certifies that no Justice has ever presided over any portion of this case or any related proceeding in the Superior Court or served as counsel of record or provided legal advice to any party to this appeal, and there are no known interested parties other than those participating in this case.

Dated: August 19, 2016, Tamuning, Guam

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii-vi
INTRODUCTION	1
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	2
STATEMENT OF FACTS	3
STANDARD OF REVIEW	8
I. A Judgment was properly entered rather than order	8
II. Unlawfully possessed drugs should not be returned	8
SUMMARY OF THE ARGUMENTS	9
I. Judgment Was Properly Entered	9
II. Seized Drugs Were Properly Withheld From Joseph	9
I. ENTRY OF A JUDGMENT RATHER THAN AN ORDER WAS CORRECT	10
A. The Trial Court’s Decision to Enter a Judgment Rather than an Order Was Correct	10
B. The Matter is Civil in Nature, a Special Proceeding, and Requires Entry of Judgment	13
C. The Jurisdictional Issue Was Waived; and Joseph’s Argument that Because No Summons Was Issued No Special Proceeding Could be Initiated is a Red Herring	16
D. 8 G.C.A. § 35.45(a) Is Inapplicable Here Because There Was No Criminal Case	17
E. Joseph Waived Any Objections to the Form of the Judgment	18
F. Every Judgment Entered Poses Prejudice to One of the Parties	19

II. THE TRAIL COURT PROPERLY FOUND THAT JOSEPH WAS NOT ENTITLED TO THE RETURN OF SOME OF THE CONTROLLED SUBSTANCES SEIZED BY PUBLIC HEALTH.....	21
A. The Guam Uniform Controlled Substances Act was applicable in the special proceeding because it was the basis of Public Health’s statutory authority for seizing Joseph’s property.....	21
B. Because the Act was the statutory basis of the seizure, the burden of proof lies with Joseph to prove that he is exempt from the Act.....	22
C. Joseph admitted that he imported at least some of the seized substances without the necessary import registration.....	24
D. There were valid reasons not to release the seized substances because Joseph was in violation of the Act and as such he lost his property rights in the seized drugs.....	27
CONCLUSION	29
GRAP 16(a)(7)(B) CERTIFICATE.....	30
GRAP 13(l) STATEMENT	31
CERTIFICATE OF SERVICE	32

TABLE OF AUTHORITIES

Cases

<i>Aguon V. Gutierrez</i> , 2002 Guam 14	23
<i>B.M. Co. v. Avery</i> , 2001 Guam 27	22
<i>Castino v. G.C. Corp.</i> , 2010 Guam 3.....	23
<i>Cristobal v. Siegel</i> , 2014, Guam 16.....	8
<i>Department of Agriculture v. One (1) Remington 12-Gauge Shotgun</i> , 1998 Guam 16.....	8
<i>Dept. of Rev. & Tax. v. Civil Service Commission</i> , 2007 Guam 17	19
<i>Geomat & Sons, Inc. v. Hong Kong and Shanghai Banking Corporation, Ltd.</i> , 2011 WL 1317248 (Guam, 2011).....	16, 17
<i>Guam Resort, Inc. v. G.C. Corp.</i> , 2012 Guam 13.....	23
<i>In the Interest of N.A., D.A., B.A., R.A., R.A., and J.A., Minors, Real Parties in Interest. M.A., Respondent-Appellant; Child Protective Services, Petitioner-Appellee.</i> 2001 Guam 7.....	19, 20
<i>Jackson v. Hayakawa</i> , 682 F.2d 1344, 1347 (9th Cir. 1982).....	16, 17
<i>Long-Term Credit Bank v. Superior Court</i> , 2003 Guam 10.....	17
<i>Mariano v. Surla</i> , 2010 Guam 2	8
<i>People v. Hopkins</i> , 171 Cal. App. 4th 305, 89 Cal. Rptr. 3rd 744, 747 (2009).....	12
<i>People v. Quichocho</i> , 1997 Guam 13	8
<i>Univ. of Guam v. Guam Civil Serv. Comm'n</i> , 2002 Guam 4.....	22

Statutes

7 G.C.A. § 3105 1

7 G.C.A. § 3107(a)..... 2

7 G.C.A. § 3108(a)..... 2

7 G.C.A. § 4101 1

7 G.C.A. § 21101 20

7 G.C.A. § 25101 2

7 G.C.A. § 25102(a)..... 2

7 G.C.A. § 30102 2, 13, 15, 20

8 G.C.A. § 1.07 17

8 G.C.A. § 1.07(a)..... 18

8 G.C.A. § 35.45 17, 18

8 G.C.A. § 35.45(a)..... 17, 18

8 G.C.A. § 65.15 18

9 G.C.A § 67.101(cc)..... 21

9 G.C.A. § 67.302 4

9 G.C.A § 67.302(a)..... 21

9 G.C.A. § 67.304(d) 4, 21

9 G.C.A § 67.306 25

9 G.C.A. § 67.502 28

9 G.C.A. § 67.502.1(a)(1)..... 2, 27

9 G.C.A. § 67.505.1	23, 26
9 G.C.A. § 67.505.1(a).....	23
9 G.C.A. § 67.505.2	23, 26
9 G.C.A. § 67.505.2(a)(1).....	23
9 G.C.A. § 67.600	26
9 G.C.A. § 67.601	4, 5
48 U.S.C.A. § 1424-1(a)(2)	2

Federal Rules

21 C.F.R. § 1301.11(a)	24, 25
------------------------------	--------

Guam Rules

Guam R. App P. 3	2
Guam R. App P. 4(a)(1).....	2
Guam R. App P. 4(a)(4).....	2
Guam R. App P. 4(c).....	2
Guam R. App P. 13(a)(9)(C)	16, 19, 22
Guam R. Civ. P. 1	14
Guam R. Civ. P. 2	11
Guam R. Civ. P. 3	11
Guam R. Civ. P. 7	10
Guam R. Civ. P. 8	11

Guam R. Civ. P. 8(c).....	12
Guam R. Civ. P. 8(e)(1).....	12
Guam R. Civ. P. 8(f).....	12
Guam R. Civ. P. 52.....	14
Guam R. Civ. P. 52(a).....	8, 14
Guam R. Civ. P. 52(b).....	15
Guam R. Civ. P. 58.....	14, 15, 19
Guam R. Civ. P. 60(b).....	19
GRE 201(a), (d).....	27

INTRODUCTION

This is a civil case in which Dr. Joel Joseph, a veterinarian, initiated a trial court action by filing a memorandum in support of a motion for the return of unlawfully possessed controlled substances seized by the Department of Public Health and Social Services (“Public Health”) pursuant to an administrative search warrant. The Guam Superior Court properly treated the action as a special proceeding, and treated the motion akin to a complaint. After an evidentiary hearing the trial court entered findings of fact, conclusions of law, and a judgment forfeiting the unlawfully possessed controlled substances.

On appeal, Joseph argues the court erred in entering a judgment as opposed to an order, and erred in forfeiting the unlawfully possessed controlled substances. This court should affirm the trial court’s rulings because (i) a judgment in a special proceeding is the final determination of the parties’ rights; (ii) by Guam rule in all actions tried by the bench where a court enters findings and conclusions, a judgment must be entered; (iii) Joseph had no right to unlawfully possess controlled substances; and (iv) Joseph failed to preserve his issues for appeal.

STATEMENT OF JURISDICTION

The Superior Court had original jurisdiction in this civil action under Title 7 G.C.A. §§ 3105 and 4101. This court has jurisdiction to hear appeals from a

final judgment of the Superior Court pursuant to 48 U.S.C. § 1424-1(a)(2), 7 G.C.A. §§ 3107(a), 3108(a), 25101, 25102(a).

Joseph appeals from a judgment issued on March 30, 2016, Movant-Appellant's Excerpts of Record (ER) at 67, and entered on the docket on March 31, 2016. Government-Appellee's Supplemental Excerpts of Record ("SER") at 261.

Following the trial court's Notice of Entry on Docket of the Judgment on March 31, 2016, Joseph filed a timely notice of appeal on April 25, 2016. ER at 68. *See* Guam R. App. P. 4(a)(1) ("In a civil case, except as provided in Rules 4(a)(4) and 4(c), the notice of appeal required by Rule 3 must be filed with the Superior Court within thirty (30) days after the judgment or order appealed from is entered.").

STATEMENT OF THE ISSUES

1. Whether the trial court properly issued a judgment, rather than an order, pursuant to 7 G.C.A. § 30102.

2. Whether the trial court properly ruled that some of the drugs seized from Joseph's clinic should not be returned to him pursuant to 9 G.C.A. § 67.502.1(a)(1).

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STATEMENT OF FACTS

On May 8 and 9, 2013 Public Health executed an administrative search warrant on Joseph's veterinarian clinic, Wise Owl Animal Hospital ("Wise Owl"). ER at 40. (Finds. Fact & Concl. L., July 7, 2015); SER at 252, (Amended Decl. Katherine Duenas, ¶ 11, Jan. 11, 2016).

The scope of the warrant authorized seizure of property, including controlled substances. ER at 21, L.2-3 (Administrative Inspection and Search Warrant, May 7, 2013). The warrant also authorized Public Health to take samples of controlled substances or what appeared to be a controlled substance. ER at 21, L.22-23 (Administrative Inspection and Search Warrant, May 7, 2013). The scope of the warrant further included inspecting and copying any inventories, sales transactions, customer billings, purchase orders, import documents, reports, records, papers or documents kept or stored in computer files, flash drives, cameras, recording devices which may indicate or bear upon what kind of, or how much of any controlled substance may have been purchased, imported or otherwise obtained, stored, labeled or handled in violation of the Guam Uniformed Controlled Substances Act. ER at 21, L.12-21 (Administrative Inspection and Search Warrant, May 7, 2013).

During the course of the search, Public Health seized drugs, medical records and other items of property. The drugs seized lacked approval by or compliance

with the Guam Food, Drug and Cosmetic Act, the federal Food, Drug and Cosmetic Act, and the U.S. Drug Enforcement Administration's regulations and mandates. SER at 53, 54, 55, 56, 57, Tr. at 61, L.8-25 and Tr. at 62, L.1-25; Tr. at 63, L.1-8; Tr. at 64, L.9-21; Tr. at 65, L.1-11. Some of the drugs were not approved by the U.S. Food and Drug Administration (FDA). SER at 57, 58, 59, 60, 61, Tr. at 65, L.17-18; Tr. at 66, L.19-25; Tr. at 67, L.1-24; Tr. at 68, L.6-25; Tr. at 69, L.1-20.

Included in the drugs seized from Joseph's clinic were controlled drug schedule drugs under 9 G.C.A. § 67.601. ER at 61 (Listing of Drugs Seized From Wise Owl on May 8, 2013); SER 57, 58; Tr. at 65, L.17-25, Tr. at 66, L.1-12.

At the time of execution of the search warrant, Joseph did not have a Controlled Substances Registration. Appellant's Br. at 2. Such a registration is issued by Public Health and authorizes the holder of the registration to handle controlled substances. 9 G.C.A. § 67.302. Joseph's Controlled Substances Registration had expired over a year before the search and seizure. Appellant's Br. at 2. The Guam Uniformed Controlled Substances Act authorizes Public Health to seize any controlled substances owned or possessed by a registrant whose CSR has expired. 9 G.C.A. § 67.304(d).

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At the time of execution of the search warrant, Joseph also did not have an import-export registration to import controlled substances. SER at 45, Tr. at 40, L.5-7. SER at 51, Tr. at 59, L.13-16. Such a registration is required to import into Guam certain controlled substances and narcotic drugs under 9 G.C.A. § 67.601. Joseph admitted that some of the seized drugs came from foreign countries; and that he did not have an import-export registration for the drugs from foreign countries. SER at 46, Tr. at 44, L.17-25; Tr. at 45, L.1.

Subsequent to the seizure of the drugs, Public Health made a determination of the legality or illegality of all 37 of the seized drugs. SER at 63, 64, Tr. at 71, L.23-25, Tr. at 72, L.1-15. The FDA also made a determination which largely confirmed Public Health's internal review of the drugs that were and were not in compliance. SER at 62, Tr. at 70, L.13-25.

Public Health seized Wise Owl's veterinarian medical records in order to conduct an audit. Not every medical record file at Wise Owl was seized. Only records which fell within the two-year time period of the audit (i.e., 4/1/11-5/8/13) were seized. SER at 252, (Amended Decl. Katherine Duenas, ¶ 10, Jan. 11, 2016).

All items seized were recorded and reflected in Guam Police Department ("GPD") Evidence/Property Custody Receipts. SER at 251, (Amended Decl. Katherine Duenas, ¶ 6, Jan. 11, 2016). A complete copy of the GPD Evidence/Property Custody Receipt forms was left by GPD on the front counter at

Wise Owl at the end of the search and seizure. No objection was made to the contents of the receipts at that time. SER at 260, (Amended Decl. Katherine Duenas, ¶ 43, Jan. 11, 2016). A return of the administrative inspection/search warrant was filed with the court on 5/15/13. No objection was made to the contents of the return at that time. SER at 260, (Amended Decl. Katherine Duenas, ¶ 44, Jan. 11, 2016).

With the exception of the drugs, the items seized by Public Health were later returned to Joseph. Public Health has no medical records (except for copies of the records it was authorized to make pursuant to the search warrant), nor physical property seized in this matter, apart from the seized drugs. SER at 260, (Amended Decl. Katherine Duenas, ¶ 45, Jan. 11, 2016).

On October 10, 2014, Joseph commenced this action in the Guam Superior Court for return of the items seized by Public Health by filing a Memorandum of Points and Authorities in Support of Motion for Return of Property Seized Pursuant to Search Warrant. ER at 1. At the time the case was initiated, the clerk of court informed Joseph's legal counsel that the matter had to be filed with an "SP" number on it. SER at 38, Tr. at 6, L.13-14. The case was assigned a Special Proceedings number. See ER at 52 (Declaration of Mitchell F. Thompson, December 13, 2015, Exhibit 3, Email of Danielle Rosette to Attorney Mitchell Thompson, October 13, 2014 at 6:19 am).

An evidentiary hearing was held on February 20, 2015 with further proceedings thereon on February 25, 2015. RA at 28 and 29. At the evidentiary hearing, Public Health moved to dismiss for lack of jurisdiction challenging the authority of the court to consider the matter as a motion, without an underlying complaint or petition being filed. SER at 37, Tr. at 4, L.24; Tr. at 6, L.3. Joseph's counsel argued it was too late for Public Health to object to the form of the proceeding. SER at 39, 40, Tr. at 7, L.18-23; Tr. at 8, L.8-9.

The court took the motion under advisement and proceeded to hear the case. SER at 41, Tr. at 9, L.21-25. At the end of the evidentiary hearing, Public Health withdrew its motion to dismiss for lack of jurisdiction. Joseph did not object to the withdrawal of the motion. SER at 65, 66, Tr. at 94, L.8-20; Tr. at 96, L.8-9. Joseph's legal counsel stated that the withdrawal of Public Health's motion "didn't matter." SER at 38, 39, Tr. at 6, L.24; Tr. at 7, L.4-5.

At the hearing Public Health presented an exhibit consisting of a color-coded listing of drugs seized from Wise Owl. The yellow color reflected drugs of indeterminate FDA approval due to lack of labeling; green reflected drugs which Public Health recommended the release of; and red reflected drugs which were not FDA approved. ER at 61 (Listing of Drugs Seized From Wise Owl on May 8, 2013; Public Health Ex. #1).

In deciding whether or not to return the property, the Superior Court adopted Public Health's recommendation of which drugs should be returned to Joseph. ER at 41-42 (Findings of Act, Conclusions of Law, and Order); ER at 44-45 (Amended Findings of Act, Conclusions of Law, and Order). The Superior Court entered judgment to that effect on March 31, 2016. Movant-Appellant's Excerpts of Record (ER) at 67. The court entered a Notice of Entry of Judgment on the Docket on March 31, 2016. SER at 261. The court agreed with the Government that Joseph initiated a cause of action equivalent to a complaint, and that the court was required under Rule 52(a) to enter a judgment. ER at 65 (Decision and Order, March 30, 2016).

STANDARD OF REVIEW

I. A Judgment was properly entered rather than order

The question of whether the judgment should be vacated and/or an order should be entered is reviewed for abuse of discretion. *Cristobal v. Siegel*, 2014 Guam 16 ¶ 8; *Mariano v. Surla*, 2010 Guam 2 ¶ 7.

II. Unlawfully possessed drugs should not be returned

The question of whether unlawfully possessed drugs should be returned involves statutory interpretation and as such is a question of law reviewed *de novo*. *Department of Agriculture v. One (1) Remington 12-Gauge Shotgun*, 1998 Guam 16 ¶ 5; *People v. Quichocho*, 1997 Guam 13 ¶ 3.

SUMMARY OF THE ARGUMENTS

I. Judgment Was Properly Entered

The trial court properly entered a judgment rather than an order. Joseph erroneously filed his motion under a criminal procedure statute, instead of initiating his cause of action as a civil matter, in the nature of a special proceeding, which the clerk assisted him in correcting. Under Guam Rules of Civil Procedure there is one form of civil action. Joseph's initiating "motion" contained all of the elements of a pleading setting forth a claim for relief. No technical form of pleading is required. When a party mistakenly designates a pleading, the court shall treat the pleading as if there had been a proper designation, as the court did in this case. Joseph waived any objection he might have had to the clerk's designation of his action as a special proceeding by acquiescing in the designation and failing to preserve his objection at the evidentiary hearing or otherwise during the proceedings at the trial court level.

II. Seized Drugs Were Properly Withheld From Joseph

The trial court acted properly in not releasing all of the substances seized during the search of his veterinary clinic. Under the Guam Uniform Controlled Substances Act Joseph bears the burden of proof. Joseph failed to provide any evidence that the seized substances were not imported. Therefore Joseph held those substances in violation of Guam and federal laws because he lacked a

required import-export registration, and required Controlled Substances Registration. Because unlawfully possessed substances are subject to forfeiture and no property right exists in them, the trial court's decision not to release the seized drugs back to Joseph was proper and should be affirmed.

ARGUMENT

I. ENTRY OF A JUDGMENT RATHER THAN AN ORDER WAS CORRECT

A. The Trial Court's Decision to Enter a Judgment Rather than an Order Was Correct

Joseph initiated this cause of action by filing a Memorandum of Points and Authorities in Support of Motion for Return of Property ("Memo To Return Property"). ER at 1 (October 10, 2014).¹

One cannot bring a motion without a pre-existing cause of action, initiated by a pleading, regardless of whether the initiating pleading is properly denominated. Rule 7 of the Guam Rules of Civil Procedure, has two separate subsections relevant to this issue: subsection (a) deals with Pleadings, while subsection (b) deals with Motions and Other Papers. Joseph initiated his action with a memorandum which should have been properly denominated a complaint. Calling the pleading a memorandum does not change the reality that the document

¹ Public Health responded to Joseph's filing through filing its Response to Motion for Return of Property Seized Pursuant to Search Warrant on November 12, 2014 (SER at 1) and through its Opposition to Movant's List of Unreturned Items, with Declarations of Katherine B. Duenas, Ronald Taitano, and R. Happy Rons on January 6, 2016 (SER at 67).

was a pleading initiating a cause of action for relief. The clerk of court recognized this by receiving and classifying the matter as a special proceeding. *See* ER at 52 (Declaration of Mitchell F. Thompson, December 13, 2015, Exhibit 3, Email of Danielle Rosette to Attorney Mitchell Thompson, October 13, 2014 at 6:19 am).

Joseph's initial filing was equivalent to a complaint. GRCP 2, entitled One Form of Action, provides that "there shall be one form of action to be known as 'civil action.' Within the category of 'civil action' there are the following kinds of cases: civil cases, domestic cases, and *special proceedings*." (emphasis added)

GRCP 3, entitled Commencement of Action, provides that a civil action is commenced by filing a complaint with the court. Although Joseph does not call his Memo to Return Property a complaint, it is equivalent to a complaint because it bears all the hallmarks of a complaint.

GRCP 8, entitled General Rules of Pleading, provides that a pleading setting forth a claim for relief, regardless of the type of pleading, should contain certain things, such as (i) a statement of the grounds upon which the court's jurisdiction depends; (ii) a short statement showing pleader is entitled to relief; and (iii) a demand for judgment for the relief which the pleader seeks.

Joseph's motion contained all of those elements of a pleading. It set forth the court's jurisdiction. ER at 5. It set forth a statement showing he was entitled to relief, by asserting that since no criminal action was pending and no disciplinary

proceeding was pending based on the lack of a Controlled Substance Registration, the property should be returned. ER at 5. It demanded relief, i.e., the property should be returned to him. ER at 7.

GRCP 8(e)(1) provides in relevant part that “no technical form of pleadings or motions are required.” Joseph’s Memo to Return Property was a pleading in terms of its function.

GRCP 8(c) provides that when a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation. That is what the trial court did here. It treated Joseph’s improper initiation of the matter by way of motion as if it had been properly designated a complaint in a civil action or special proceeding. The court held that “Movant essentially initiated a cause of action, equivalent to a complaint.” ER at 65 (Dec. & Order, March 30, 2016).

GRCP 8(f) provides that “All pleadings shall be so construed as to do substantial justice.” The court treated the Memo to Return Property as a pleading, to render substantial justice to both parties.

An individual whose property has been seized under color of law may seek return of the property in a civil action for recovery of property with an attendant right to appeal from any adverse civil judgment. *People v. Hopkins*, 171 Cal. App. 4th 305, 89 Cal. Rptr. 3rd 744, 747 (2009).

Joseph waived any objection he may have had to the form of the proceedings occurring as a special proceeding by not objecting when he had notice. The court held accordingly. “It is the court’s position that Movant should have addressed any issues as to form *prior* to this court’s conducting of an evidentiary hearing.” ER at 65 (Dec. & Order, March 30, 2016).

The trial court’s decision to characterize Joseph’s motion as a complaint was properly within the court’s authority.

B. The Matter is Civil in Nature, a Special Proceeding, and Requires Entry of Judgment

Because the Guam Superior Court properly characterized Joseph’s motion as a complaint filed as a special proceeding, the court was required to enter a judgment as opposed to an order.

1. *7 G.C.A. § 30102 supports entry of judgment*

Section 30102 provides: “A *judgment* in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.” 7 G.C.A. § 30102 (emphasis added).

Joseph’s action is a special proceeding and therefore entry of a judgment properly lies as the final determination of the rights of the parties.

2. *GRCP 1 supports entry of judgment*

The Guam Rules of Civil Procedure govern the procedure in “all suits of a civil nature, including civil actions, domestic actions, *special proceedings...*” Guam R. Civ. P. 1 (2014) (emphasis added).²

3. *GRCP 52 supports entry of judgment*

Guam R. Civ. P. 52 (2014) provides in relevant part that “In *all* actions tried upon the facts without a jury....the court shall find the facts specially and state separately in its conclusions of law thereon, and judgment *shall* be entered pursuant to Rule 58...” (emphasis added). The trial court stated:

Here, an evidentiary hearing was conducted and this court issued its Findings of Fact and Conclusions of Law based on the evidence presented. With regards to the court’s issuing of such findings and conclusions, the Rules make no distinction between special proceedings and civil matters. Therefore, because this matter was an action tried upon the facts without a jury,” this court is required under Rule 52(a), to enter a judgment.

ER at 65 (Dec. & Order, March 30, 2016).

The language of GRCP 52 is mandatory that in all actions tried upon the facts without a jury, in which findings and conclusions are made, a judgment must be entered.

In this case, the action was tried upon the facts without a jury. RA at 28. Findings of Fact and Conclusions of Law were made by the trial court here. ER at 9. (Finds. Fact & Concl. L., July 7, 2015). The trial court entered a judgment

² Joseph errs in claiming that this matter is governed by the Guam Rules of Criminal Procedure. No criminal case was ever filed against Joseph.

thereafter. ER at 67 (Judgment, March 30, 2016). Entry of judgment was mandatory.

4. *GRCP 58 supports entry of judgment*

GRCP 58 requires that “[e]very judgment and amended judgment must be set forth on a separate document,” subject to a few exceptions including a motion to amend the court’s findings under Rule 52(b). Here, the trial court amended its findings. ER at 44 (Amended Finds. Fact & Concl. L., October 30, 2015). Therefore, Rule 58 required a separate document.

Joseph’s position that this matter is not subject to entry of a judgment disregards the plain language of 7 G.C.A. § 30102 and the relevant rules of civil procedure. This matter is a contested civil matter which needs to be resolved with finality. Public Health, as a party, is entitled to resolution of this matter with finality. Entry of a judgment is the appropriate vehicle to get to such finality. The trial court’s decision to enter a judgment should be affirmed.

C. The Jurisdictional Issue Was Waived; and Joseph’s Argument that Because No Summons Was Issued No Special Proceeding Could be Initiated is a Red Herring

1. *Joseph Waived the Jurisdictional Issue*

Joseph failed to preserve for appeal the issue of lack of any summons served in the special proceedings action. At no time during the trial court proceedings did

Joseph raise the issue of lack of summons or the fact that he objected to the special proceedings case.

It was not raised in Joseph's Objection to Government's Proposed Findings, ER at 36, nor in Joseph's Memo in Support of Motion to Vacate Judgment, *see* Record on Appeal ("RA"), Docket No. 54, nor in Joseph's Reply Motion In Support of his Motion to Vacate Judgment, *see* RA, Docket No. 58. Nor did Joseph object to the clerk of court's email of October 13, 2014 at 6:19 a.m. in which the clerk said the "case will be assigned a special proceedings case #". ER at 52.

GRAP 13(a)(9)(C) requires that appellant state where in the record on appeal the issue was raised and ruled on. Appellant Joseph did not comply with this rule nor did he raise such objections in the trial court. Therefore he waived these objections.

2. *Argument that Because No Summons Was Issued No Special Proceeding Could Be Initiated is a Red Herring*

Joseph argues that mere notice of a claim is insufficient, and that if a defendant has not been properly served a court lacks jurisdiction. This is a red herring because defendants can waive the defect of lack of personal jurisdiction by appearing generally without first challenging the defect in a preliminary motion or in a responsive pleading. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982); accord, *Geomat & Sons, Inc. v. Hong Kong and Shanghai Banking*

Corporation, Ltd., 2011 WL 1317248 (Guam, 2011), at *8 (citing *Long-Term Bank of Japan v. Superior Court of Guam*, 2003 Guam 10).

Jurisdiction attaches if a defendant makes a voluntary general appearance, as by filing an answer through an attorney. *Jackson v. Hayakawa*, 682 F.2d at 1347. Public Health voluntarily appeared through counsel, and while initially challenging jurisdiction of the court, subsequently withdrew its motion. SER at 65, Tr. at 94, L.8-15. Public Health filed the equivalent of an answer, i.e., its Response to Motion for Return of Property, November 12, 2014, SER at 1, and its Opposition to Movant's List of Unreturned Items, January 6, 2016, SER at 67. Public Health waived any alleged defect of lack of personal jurisdiction.

The issue of lack of jurisdiction is a red herring and should not be considered by this court for the foregoing reasons.

D. 8 G.C.A. § 35.45(a) Is Inapplicable Here Because There Was No Criminal Case

Joseph's insistence that 8 G.C.A. § 35.45(a) authorizes the relief he requested via motion is misplaced because no criminal case was pending within which to file such a motion. Section 35.45 is found in the Guam Criminal Procedures Code. Section 1.07 in the Criminal Procedure Code provides in relevant part:

The provisions of this Code *govern the practice and procedure in every criminal proceeding prosecuted in the name of the Territory.* They are intended to provide for the just determination of every

criminal proceeding and shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

8 G.C.A. § 1.07(a) (emphasis added).

Section 35.45 provides that “a person aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized.” 8 G.C.A. § 35.45(a). There was no finding of fact nor conclusion of law entered that an unlawful search and seizure occurred. ER at 39-43 (Finds. Fact & Concl. L., July 7, 2015); ER at 44-46 (Amended. Finds. Fact & Concl. L., October 30, 2015).

Section 35.45 also provides that “a motion for return of property may also be treated as a motion to suppress under § 65.15.” 8 G.C.A. § 35.45(a). Thus, Section 35.45 being a criminal procedure statute is meant to be applied in the criminal context. Since no criminal proceedings were brought, the clerk of court properly designated the matter as a special proceeding, and the trial court properly addressed the matter as a civil proceeding in the nature of a special proceeding.

This court should find that 8 G.C.A. § 35.45 is inapplicable because there was no criminal case.

E. Joseph Waived Any Objections to the Form of the Judgment

Joseph’s assertion that the judgment does not comply with GRCP 58 because it references other documents is waived pursuant to Joseph’s failure to move the trial court for relief from that alleged error. Joseph does not address the

issue in his Motion to Vacate the Judgment, nor in his Reply Brief on his Motion to Vacate the Judgment. RA at 54 and 58, respectively. Neither did Joseph file a motion to amend the judgment, nor a motion for relief from a judgment. Joseph failed to state where in the record on appeal the issue was raised and ruled on. *See* GRAP 13(a)(9)(C). The issue is waived.

Even if the issue had not been waived, the judgment should still be affirmed. The single Guam case cited by Joseph in support of his argument that a judgment which incorporates another document may not comply with GRCP 58, merely notes, without deciding the issue, of the propriety of the judgment therein which incorporated another document. *Dept. of Rev. & Tax. v. Civil Service Commission*, 2007 Guam 17, ¶ 11, n. 4. At most, the reference to other documents is harmless error.

This court should find and rule that Joseph waived any objection to the form of the judgment and affirm the trial court's entry of judgment.

F. Every Judgment Entered Poses Prejudice to One of the Parties

Section 6 of Appellant's Br. at 20 (July 20, 2016) asserts "The Judgment Poses Prejudice to Joseph." Joseph waived any objection he had with regard to the judgment posing prejudice to him through his failure to move the trial court for relief from the judgment per GRCP 60(b). "Because he did not file a motion, there is no denial of Rule 60(b) relief to be reviewed by this court." *In the Interest of*

N.A., D.A., B.A., R.A., R.A., and J.A., Minors, Real Parties in Interest. M.A., Respondent-Appellant; Child Protective Services, Petitioner- Appellee. 2001 Guam 7 ¶ 14.

Every judgment, by the very nature of a judgment, poses prejudice to one party or the other. “A judgment is the final determination of the rights of the parties in an action or proceeding.” 7 G.C.A. § 21101. (Judgment Defined).

Joseph initiated his action in Superior Court requesting relief. A full evidentiary hearing was held. Findings of Fact and Conclusions of Law were submitted by both parties to the trial court. The trial court entered Findings and Conclusions (ER at 39, July 7, 2015) and subsequently entered Amended Findings and Conclusions (ER at 44, October 30, 2015). A judgment was appropriately entered thereafter, as the proper conclusion of all the proceedings. ER at 67, March 30, 2016.

In summary, the trial court properly issued a judgment, rather than an order, pursuant to an evidentiary hearing being held, and findings of fact and conclusions of law being entered in this special proceeding case pursuant to 7 G.C.A. § 30102. As a result, this Court should affirm the trial court’s entry of judgment.

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II. THE TRIAL COURT PROPERLY FOUND THAT JOSEPH WAS NOT ENTITLED TO THE RETURN OF SOME OF THE CONTROLLED SUBSTANCES SEIZED BY PUBLIC HEALTH

A. The Guam Uniform Controlled Substances Act was applicable in the special proceeding because it was the basis of Public Health's statutory authority for seizing Joseph's property

Joseph erroneously argues that because he brought a motion under a criminal statute to seek the return of seized property, the Guam Uniform Controlled Substances Act (the "Act" hereinafter) was inapplicable to the instant special proceeding in the trial court.

The Act is applicable here because it defines a veterinarian as a practitioner who distributes or dispenses controlled substances in the course of professional practice, and Joseph is a practicing veterinarian. 9 G.C.A. § 67.101(cc). The Act requires that a person who manufactures, distributes or dispenses a controlled substance within Guam shall obtain a Controlled Substances Registration ("CSR") issued by Public Health. 9 G.C.A. § 67.302(a).

Joseph was required to have a valid CSR. *See* 9 G.C.A. § 67.101(cc); 9 G.C.A. § 67.302(a). Joseph's CSR expired on April 30, 2012. Appellant's Br. at 2. The Act authorizes Public Health to seize any controlled substances owned or possessed by a registrant whose CSR has expired. 9 G.C.A. § 67.304(d).

The administrative search and seizure at issue was conducted on May 8, and 9, 2013, while Joseph's CSR was still expired. Thus Public Health lawfully seized the controlled substances found during that search. *See* 9 G.C.A. § 67.304(d).

In summary, the Act was the very statutory ground that the underlying search and seizure at issue was based on. The Act was the applicable governing law in the trial court proceeding. Therefore, this court should affirm the trial court's ruling.

B. Because the Act was the statutory basis of the seizure, the burden of proof lies with Joseph to prove that he is exempt from the Act

Joseph erroneously claims that his motion for return of property seized pursuant to the search warrant was not a "proceeding under the Act", and that the burden-shifting provisions in the Act should not have been applied.

This is a new argument raised by Joseph for the first time on appeal. Nowhere does Joseph state where in the record on appeal the issue was raised and ruled on, as required by GRAP 13(a)(9)(C). It is nowhere to be found in the transcript of the evidentiary hearing, nor in Joseph's Objection to Government's Proposed Findings. ER at 36-38.

This Court generally does not address an argument raised for the first time on appeal. *See, e.g., Univ. of Guam v. Guam Civil Serv. Comm'n*, 2002 Guam 4 ¶ 20 (declining to address an argument raised by the appellant for the first time on appeal); *B.M. Co. v. Avery*, 2001 Guam 27 ¶ 33 (rejecting the argument that the

trial court used an improper measure of damages for claims regarding construction defects because the issue was raised for the first time on appeal). Joseph waived this argument and this court should so find.

In the event that the Court allows Joseph to make this argument, Public Health addresses it as follows.

Both 9 G.C.A. § 67.505.1 and § 67.505.2 state, in relevant part:

It shall not be necessary for the government to negate any exemption or exception in this Act in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under this Act. The burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

9 G.C.A §§ 67.505.1(a) and 67.505.2(a)(1).

Statutory interpretation begins with the language of the statute. *Guam Resorts, Inc. v. G.C. Corp.*, 2012 Guam 13 ¶ 7 (citing *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6). “[W]here a statute is clear on its face, the court shall not read further.” *Castino v. G.C. Corp.*, 2010 Guam 3 ¶ 58; see also *Guam Resorts, Inc.*, 2012 Guam 13 ¶ 7 (stating that plain reading construction applies when statute is clear on its face).

The plain reading of 9 G.C.A. § 67.505.1 and § 67.505.2 shift the burden of proof to the person claiming the exemption or exception. In other words, the one claiming that the Act does not apply to him must prove it does not apply. Joseph

claims that the Act should not have applied during the trial court proceeding, and thus the burden of proof lies with him.

Here, the Act applies because it was the statutory basis for the seizure.

The trial court properly concluded as a matter of law that Joseph bears the burden of proof, that in the absence of an appropriate registration under the Act he is presumed not to hold such registration, and that Joseph failed to provide such proof. ER at 42. This court is requested to affirm the trial court's rulings.

C. Joseph admitted that he imported at least some of the seized substances without the necessary import registration

Although Joseph argues that the trial court failed to specify which drugs had been imported, and thus erred in refusing to release all of the substances seized during the search, Joseph himself admitted that he imported seven red list, non-FDA approved drug substances 8, 9, 10, 11, 12, 33, and 35. Appellant's Br. at 27; SER at 43, 44, Tr. at 33, L.1-7; Tr. at 37, L.23-25. ER at 61. Joseph likewise admits he did not have an import-export registration on May 8, 2013. SER at 45, Tr. at 40, L.5-7.

Federal law requires that every person who manufactures, distributes, dispenses, imports, or exports any controlled substance or who proposes to engage in the manufacture, distribution, dispensing, importation or exportation of any controlled substance shall obtain a registration. 21 C.F.R. § 1301.11(a). The Act mandates that a person registered to manufacture, distribute or dispense controlled

substances under the Act keep records and maintain inventories in compliance with Federal law. 9 G.C.A. § 67.306.

The foregoing evidence and law supports the trial court's conclusions that: (1) Joseph had no import-export registration, (2) consequently Joseph was in violation of 21 C.F.R. § 1301.11(a) and 9 G.C.A. § 67.306, and (3) therefore all other items not recommended by Public Health for return to Joseph, which would include all of the red and yellow list drugs, not be returned to Joseph but rather remain in the custody of Public Health. ER at 42, 43.

Public Health testified that many of the drugs seized were of foreign origin, based on the labeling. SER at 54, Tr. at 62, L.2-9. Some of the drugs were not even labeled to show the source of origin, as required by law. SER at 55, Tr. at 63, L.2-4. The record reflects, and Public Health's testimony confirmed, that not a single import registration was ever found during the search. ER at 42 ¶ 8 (Finds. Fact & Concl. L., July 6, 2015); SER at 51, Tr. at 59, L.13-16. Public Health testified that Joseph did not keep records and maintain inventories in compliance with the Act. SER at 50, 51, Tr. at 58, L.18-25; Tr. at 59, L.4-6.

Joseph concedes in his own brief that Buprenorphine Hydrochloride and Buprenex, two of the substances seized from Joseph's clinic, are narcotic substances that required a registration to be imported but argues that there was no evidence that these substances were imported. Appellant's Br. at 27. As discussed

above, Joseph has the burden of proof. 9 G.C.A. §§ 67.505.1 and 67.505.2. He has not submitted any evidence that these substances were not imported.

Joseph admitted in his testimony during the evidentiary hearing that it was “very common for the veterinarians and doctors and others, people here on Guam to buy drugs from Taiwan, Hong Kong, Australia, New Zealand, et cetera – and Canada.” SER at 43, Tr. at 33, L.17-20. Later in his testimony, Joseph again emphasized that “in general it is very common for medical professionals throughout Guam to bring in these drugs from these places.” SER at 48, Tr. at 46, L.19-22.

Guam’s Uniform Controlled Substances Act defines the term “import” to mean, with respect to any article, any bringing in or introduction of any such article into any area on Guam. 9 G.C.A. § 67.600.

It was unnecessary for the court to specify which drugs had been imported, based not only on the above-mentioned testimony of Joseph and Public Health, and on Joseph’s burden of proving the drugs were not imported, but also on the indisputable fact that Guam is an island in the western Pacific Ocean where everything that is not produced on the island has to be imported. There are no drug manufacturers on Guam. It logically follows that all pharmaceutical products found on the island must have been imported, and hence all substances seized at

Joseph's clinic were imported. Public Health respectfully requests this Court to take judicial notice of this fact pursuant to GRE 201(a),(d).

Because it is not subject to reasonable dispute that all of the seized drugs were imported, and because Joseph failed to prove the drugs were not imported, it was unnecessary for the court to specify which of the drugs were imported when it properly refused to release the seized drugs. Joseph has failed to meet his burden of proof to support his position that the substances were not imported as he produced no evidence supporting his position. This court is requested to so rule and affirm the trial court's ruling.

D. There were valid reasons not to release the seized substances because Joseph was in violation of the Act and as such he lost his property rights in the seized drugs

Joseph erroneously claims that the trial court did not have any valid reason not to release the seized substances. The Act states that all controlled substances which have been acquired or held in violation of the provisions of the Act are subject to forfeiture and no property right shall exist in them. 9 G.C.A. § 67.502.1(a)(1). Rosanna Rabago from Public Health testified that Joseph was in violation of the Act and other relevant federal laws based on numerous factual findings from Public Health's investigation (e.g., lack of registration or import records for controlled substances; lack of import-export registration; possession of non-FDA approved drugs and drugs not in compliance with U.S. Drug

Enforcement Administration regulations and mandates). SER at 51, 52, 53, Tr. at 59-61. Some of the drugs violated labeling requirements. SER at 54, 58, Tr. at 62, L.22-25. ER at 61; Tr. at 66, L.16-18. Substance 34 on the list of seized drugs is unlawful to possess even though it is not a controlled substance, because it is not FDA-approved. SER at 60, 61, Tr. at 68, L.24-25; Tr. at 69, L.1-12. Substance 35 on that list is unlawful to possess even though it is not on the scheduled list of drugs. SER at 61, Tr. at 69, L.13-20.

Based on substantial and extensive testimony of key witnesses and substantial evidence admitted at the evidentiary hearing and as evidentiary attachments to Public Health's Opposition to Movant's List of Unreturned Items, with Declarations, January 6, 2016, SER at 67, the trial court correctly concluded as a matter of law that Joseph had violated the Guam Uniform Controlled Substances Act. Based on the relevant provisions therein, the trial court properly refused to release the seized substances to Joseph. ER at 42. Based on the facts and applicable law discussed above, the trial court's decision should be affirmed.

In summary, the trial court correctly ruled that Joseph should not receive some of his drugs back on the Listing of Drugs Seized from Wise Owl on 5/8/13 (See ER at 61) under 9 G.C.A. § 67.502.

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CONCLUSION

Based on the foregoing, the court should affirm the trial court's entry of judgment herein, and affirm the trial court's judgment incorporating findings of fact and conclusions of law, and amended findings of fact and conclusions of law, ordering Public Health to return to Joseph drug item #s 1, 2, 5, 6, 7, 13, 18, 23, 24, 25, 26, 27, 29, 29, 30, 32 and 37 on the list, (ER at 61), and ordering Public Health to retain all of the remaining drug item on the list, (ER at 61).

Respectfully submitted this 19th day of August, 2016.

OFFICE OF THE ATTORNE GENERAL
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R. HAPPY RONS
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GRAP 16(a)(7)(B) CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 16(a)(7)(B) because this brief contains 6,773 words, excluding the parts of the brief otherwise exempted from Rule 16(a)(7)(B)(iii).

Dated: August 19, 2016, Tamuning, Guam

OFFICE OF THE ATTORNEY GENERAL
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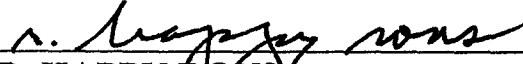
R. HAPPY RONS
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GRAP 13(l) STATEMENT OF RELATED CASES

The undersigned knows of no other cases related to this appeal.

Dated: August 19, 2016, Tamuning, Guam

OFFICE OF THE ATTORNEY GENERAL
ELIZABETH BARRETT-ANDERSON
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R. HAPPY RONS
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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2016, I caused a copy of the foregoing to be served by hand-delivery as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 19, 2016, Tamuning, Guam


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